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UNITED STATES DISTRICT COURT
Southern District of California

SAN DIEGO MINUTE MEN

Plaintiff,

vs.

DALE BONNER in his Official Capacity
as Agency Director, Business,
Transportation and Housing Agency;
WILL KEMPTON in his Official
Capacity as CalTrans Director; PEDRO
ORSO-DELGADO in his Official
Capacity as Caltrans District Director and
DOES 1 through 50,

Defendants.

Case Number: 08CV0210 WQH [RBB]

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS COMPLAINT
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 12(b)(1), (2) AND
(6)**

Hearing Date: May 9, 2008
Hearing Time: 1:30 p.m.
Courtroom: Courtroom 4
Judge: William Q. Hayes

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I. INTRODUCTION

The motion by Defendants [Doc# 19] is replete with factual assertions not found in Plaintiff's complaint. In short, the entire motion is based on Defendants' attempt to misdirect Plaintiff's claim as one about "moving Plaintiff's recognition sign from one location to another." Indeed, the entirety of Defendants' 12(b)(6) analysis is premised on this incorrect statement of Plaintiff's case. To be absolutely clear, that is *not* Plaintiff's claim. As alleged in the complaint herein, Plaintiff San Diego Minutemen, an association of individuals whose purpose is to advocate the enforcement of all U.S. laws, alleges that:

- On or about September 18, 2007, plaintiff applied for an Adopt-a-Highway encroachment permit. [*Complaint* [Doc#1], ¶8];
- On or about November 21, 2007 an encroachment permit, allowing plaintiff to maintain the shoulders of Interstate 5 near San Onofre, was issued. *Complaint* [Doc#1], ¶10];
- Defendants erected the Adopt-a-Highway sign (bearing the name SAN DIEGO MINUTEMEN) on the northbound side of Interstate 5 just south of the San Onofre, Immigration Check Point [*Complaint* [Doc#1], ¶11];
- In January of 2008, numerous members of plaintiff's organization, dressed in CalTrans approved hard hats and safety vests proceeded to clean up their Adopt-a-Highway assigned area [*Complaint*, [Doc #1] ¶12].
- That the termination of its Adopt-a-Highway sign and requisite privileges and obligations was terminated in violation of their First Amendment rights because of content and viewpoint discrimination by defendants herein and possibly others including members of the California Legislature [*Complaint* [Doc#1], ¶15.1.];
- the actions of defendants and each of them in terminating plaintiff's site specific Adopt-a-Highway location was done arbitrarily, capriciously and based upon the unfettered discretion given to the defendants and each of them in violation of plaintiff's constitutional rights to free speech and equal protection under the laws [*Complaint* [Doc#1], ¶15.2.];

- 1 • Defendants did not follow their own policies and procedures in removing plaintiff's
- 2 sign and plaintiff's Rights to a site specific Adopt-a-Highway sign and that defendant
- 3 CalTrans' procedures do not allow for a hearing or for plaintiff or any individual to
- 4 present evidence which refutes or challenges a revocation of an Adopt-a-Highway
- 5 permit [*Complaint* [Doc#1], ¶15.3.]; and
- 6 • The actions of defendants and each of them in depriving plaintiff of its Rights to
- 7 freedom of speech and expression, procedural due process and equal protection under
- 8 the laws, violated plaintiff's Rights [*Complaint* [Doc#1], ¶19].

9

10 Defendants' attempt to characterize Plaintiff's complaint as being about "moving the sign" is

11 misplaced. First, it is factually erroneous. Plaintiff alleges, and the facts demonstrate that, Plaintiff's

12 site specific permit was *revoked*. Plaintiff has not accepted any new permit for a new location for

13 its litter cleanup activities. To be sure, Plaintiff *does* address Defendants' *attempted* relocation of

14 Plaintiff's site-specific permit (and the accompanying recognition sign) from its original location to

15 a remote location, but does so only to soundly negate Defendants' argument that such a movement

16 "saves" Defendants' constitutional violations (*see* discussion at Section B.4, *ante*), not as a basis for

17 Plaintiff's claims herein.

18

19 The *gravamen* of Plaintiff's Complaint is that every decision made by Defendants (*after* it

20 properly approved the site-specific permit to the San Diego Minute Men) was based on Defendants

21 dislike of the *viewpoint* of Plaintiff – every excuse and justification for revoking that site-specific

22 permit arises because of the association of the Minute Men's name with that group's *viewpoint*

23 regarding enforcement of the U.S. immigration laws. Such conduct violates the guarantees of the

24 U.S. Constitution.

25

26 Taking Plaintiff's allegations as true, as this Court must on a motion to dismiss, Plaintiff has

27 certainly stated facts sufficient to constitute the causes of action alleged in the complaint. Therefore,

28 the motion to dismiss must be denied.

1 Apart from the substantive issues raised, Defendant Caltrans (and the individual defendants in
2 their “official capacity”) also raises jurisdictional issues involving the claims asserted against it
3 pursuant to 12(b)(1) and (2) (lack of subject matter/personal jurisdiction). Caltrans asserts it is
4 immune from suit pursuant to the Eleventh Amendment to the United States Constitution. The
5 individual defendants assert they are equally immune in their “official capacity” from such claims.
6 As set forth more fully below, Plaintiff asserts that the Eleventh Amendment does not afford
7 Caltrans (or the individual defendants in their “official capacity”) immunity on a claim arising from
8 federal question jurisdiction and which seeks prospective injunctive relief and, therefore, the claims
9 asserted against Caltrans and the individual defendants in their official capacity herein are properly
10 stated.

11
12 The analysis employed on a motion to dismiss is not controversial. A Court will review the
13 material factual allegations of the complaint to determine whether the plaintiff has stated a claim
14 upon which relief may be granted. Given this paradigm, Plaintiff is troubled by Defendant’s
15 repeated recitation of, and reliance on, purported facts which are beyond the complaint. Indeed,
16 Defendants do not make *one citation* to Plaintiff’s Complaint in their moving papers – peculiar
17 indeed for a motion to dismiss which entirely rests on the Complaint’s allegations. Instead, the
18 motion resembles a motion for summary judgment, replete with facts far removed from Plaintiff’s
19 Complaint and which are wholly unsupported by evidence. While it is perhaps understandable that
20 Defendants wish to avoid the facts as pleaded by Plaintiff, on a motion to dismiss Defendants remain
21 bound by allegations contained within the four corners of the Complaint. Though facts extraneous
22 to the Complaint should not be considered by the Court on a motion to dismiss, Plaintiff will correct
23 the factual record with undisputed testimony from Defendants themselves where appropriate to avoid
24 the potential confusion such errors in fact may create and demonstrate the truth of the complaint’s
25 allegations. Should the Court consider Defendants’ motion as one pursuant to Federal Rule of Civil
26 Procedure 56, it still must fail as the undisputed facts demonstrate the propriety of Plaintiff’s claims.

27 //

28 //

II. LEGAL DISCUSSION

A. LEGAL STANDARD.

In ruling on a motion to dismiss, the Court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir.1985). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enterprises*, 476 F.2d 393, 396 (9th Cir.1973).

Here, upon review of the facts *alleged in the Complaint*, it is clear that Plaintiff has set forth facts which, if proven, would entitle it to the relief requested herein. Therefore, the motion to dismiss must be denied.

B. PLAINTIFF'S CLAIM AGAINST DEFENDANTS IS RIPE BECAUSE PLAINTIFF HAS SUFFERED IRREPARABLE INJURY AND HARM.

The first salvo lobbed by Defendants is that Plaintiff cannot state a claim because Plaintiff has suffered no harm. This assertion by Defendants is falsely premised upon their suggestion that Plaintiff's claims arise from "relocation of Plaintiff's sign." As noted above, such is not Plaintiff's claim.

As set forth in detail below, Plaintiff's Complaint herein states cognizable claims for violation of its Rights under the First and Fourteenth Amendments of the United States Constitution, as well as a claim pursuant to 42 U.S.C. Section 1983. It is settled that when a claim for violation of constitutionally protected rights is shown, injury has been demonstrated. *Associated Gen. Contractors of Calif. vs. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991). The presumption of irreparable injury is particularly strong in cases involving infringement of First Amendment Rights: "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary

1 injunction. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

2
3 Thus, the loss of freedom of speech, the disparate treatment of Plaintiff *vis-a-vis* every other
4 participant in the Adopt-A-Highway Program (none of whom has never had their permit revoked as
5 a result of the participant's *viewpoint*), the substantive and procedural due process violations visited
6 upon Plaintiff are certainly sufficient to establish the ripeness of Plaintiff's claims.

7
8 **C. PLAINTIFF HAS PROPERLY STATED A CAUSE OF ACTION FOR VIOLATION**
9 **OF ITS CONSTITUTIONAL RIGHT OF FREE SPEECH.**

10
11 Plaintiff's claim herein is that Defendants systematically deprived Plaintiff of its right to free
12 speech, equal protection and procedural due process when Defendants revoked Plaintiff's site-
13 specific encroachment permit for location designated ND 5: SD66.3-SD68.3 and removed its
14 recognition because of pressure from others who did not like the message that Plaintiff's group, and
15 its recognition sign, represented. The propriety of Plaintiffs first amendment claim rests upon an
16 analysis of the level of scrutiny given to Defendants' decision, the public forum at issue and the
17 reasons underlying Defendants' removal of Plaintiffs sign at the behest of opponents to Plaintiff's
18 viewpoint. As set forth below, even under the least challenging scrutiny, Defendants' viewpoint-
19 based reasoning for revoking the Plaintiff's site specific permit clearly violates Plaintiff's
20 constitutional Rights. Axiomatically, under more intense scrutiny, the decision by Defendants is not
21 even close to passing constitutional muster.

22
23 **1. The San Diego Minute Men's Participation in the Adopt-A-Highway Program and its**
24 **Recognition Sign are Speech.**

25 The question of whether or not the San Diego Minute Men's participation in the Adopt-A-
26 Highway program is speech is settled. Other jurisdictions have considered that precise issue. For
27 example, in *Knights of Ku Klux Klan v. Arkansas State Highway and Transp. Dept.*, 807 F. Supp.
28 1427 (W.D. Ark. 1992), the Court noted:

1 *The court also has no doubt but that the individuals, businesses, groups and*
 2 *other organizations participating in the program are engaged in "speech" when*
 3 *they participate.*

4 *Id.*, 807 F.Supp. at 1435. [Emphasis supplied..]

5
 6 Of course, the means by which the San Diego Minute Men, or any other permittee gains such
 7 recognition is via the recognition sign which bears its name and speaks the participant's message
 8 embodied in its name. Other courts have similarly held the Adopt-A-Highway sign is speech. *See*
 9 *Cuffley v. Mickes*, 44 F.Supp.2d 1023, 1026 (E.D. Mo. 1999) [*Cuffley II*].

11 **2. Defendants Revoked the Site-Specific Permit of Plaintiff San Diego Minute Men.**

12 Defendants suggest there was no revocation of Plaintiff's site-specific permit, but instead a
 13 "relocation." These purported facts are outside the complaint, and are not properly considered on
 14 a motion to dismiss. (*Western Reserve, supra.*) The Complaint herein specifically alleges that "on
 15 January 28, 2008, plaintiff's president, Jeff Schwilk, received a letter from Pedro Orso-Delgado,
 16 CalTrans District Director, informing him that because plaintiff's participation "raised questions",
 17 CalTrans was terminating and revoking plaintiff's permit at the site specific location at the U.S.
 18 Border Inspection Station on Interstate 5, San Onofre, California." *Complaint* [Doc #1] at p.3, ¶13.

19
 20 Moreover, Defendant Kempton, Director of Caltrans, specifically testified that Plaintiff's permit
 21 had been revoked:

22 Q: OKAY. BUT IN THIS CASE YOU DIDN'T REVOKE THE PERMIT, DID YOU?
 OR DID YOU REVOKE IT? I DON'T KNOW.

23 KEMPTON: TECHNICALLY, THAT EXISTING PERMIT WAS REVOKED.

*

24 Q: ALL RIGHT. NOW I UNDERSTAND. BECAUSE I WAS A BIT CONFUSED
 ABOUT THAT. TECHNICALLY, THE PERMIT HAS BEEN REVOKED, IS THAT
 25 FAIR?

26 KEMPTON: THAT SPECIFIC PERMIT WHICH IS A CONTRACT FOR THAT LOCATION
 HAS BEEN REVOKED.

27 *Deposition of William Alan Kempton* ("Kempton Depo."), [47:20-23] and [48:3-7]. [*LRF Decl. Ex.1*,
 28 pp. 11-12]. A true and correct copy of portions of the transcript of the Kempton Depo are attached
 as Exhibit "1" to the Declaration of Lowell Robert Fuselier. ("*LRF Decl.*") filed contemporaneously
 herewith. The complete transcript will be lodged with the Court at the hearing hereon.

3. Regardless of the Type of Public Forum Northbound Interstate 5 Constitutes, the Conduct of Defendants Violates Plaintiff's First Amendment Rights.

a. Even if the Highway is a "Nonpublic Forum," Defendant's Revocation of Plaintiff's Site-Specific Permit violates Plaintiff's Constitutional Rights.

To analyze a claim of violation of free speech rights on public property under the United States Constitution, the analysis employed is as follows:

"[W]e must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). If the forum is public, "speakers can be excluded ... only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.* at 800, 105 S.Ct. 3439. If, on the other hand, the forum is non-public, the government is free to restrict access "as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001).

That is not the end of the inquiry, for public property is further divided into three groups:

"Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora." *FN5DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir.1999), cert. denied, 529 U.S. 1067, 120 S.Ct. 1674, 146 L.Ed.2d 483 (2000) (quoting *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir.1998)). A designated public forum exists where "the government intentionally opens up a nontraditional forum for public discourse." *Id.* "Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum," i.e., strict scrutiny. *Id.* at 964-965 (citing *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992)).

Id.

In this case, the property involved is a public highway and adjacent shoulder - Interstate 5 Northbound, clearly public property. Several Courts have held that highways and the adjacent shoulder are "traditional public fora" for purposes of scrutiny of the abridgement of speech (*see discussion, ante*). But even in cases where a Court has concluded that the highway thoroughfare was a non-public forum, the result has been the same - the free speech right may not be abridged based upon a distaste for the message of the speaker or the controversy surrounding it.

1 The issue presented in this case – whether the denial (revocation) of a group’s right to participate
 2 in an Adopt-A-Highway program based on the group’s viewpoint is repugnant to the constitutional
 3 principal of free speech - has been precisely addressed by courts in the Eighth Circuit. In *Cuffley II*,
 4 *supra*, the District Court parted company with prior decisions and held instead:

5 Although the speech analysis in this matter has not changed, the Court disagrees
 6 somewhat with the forum analysis in *Cuffley I*. *** At this time, in light of the
 7 MHTC’s subsequent attempts to limit access to the program, the Court finds that the
 8 MHTC attempted to create a nonpublic forum rather than a designated public
 9 forum.

10 *

11 Having concluded that this case involves a nonpublic forum, the Court must now
 12 address the regulations imposed by the MHTC. Access to nonpublic fora can be
 13 restricted as long as the restrictions are reasonable and *are not an effort to suppress*
 14 *expression merely because public officials oppose the speaker’s view*.
 15 *Cuffley II, supra*, at 1027, citing *Cornelius v. N.A.A.C.P. Legal Defense and Educ. Fund, Inc.*, 473
 16 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985). [Emphasis supplied.]

17 But even under this least restrictive analysis, the Court in *Cuffley II* found that denial of the
 18 KKK’s participation in the program based on its viewpoint violated the KKK’s right to free speech.
 19 In this case, the decision of Defendants to revoke the permit of Plaintiff was *precisely because of*
 20 *the viewpoint* of Plaintiff. This allegation is borne out by the testimony of Defendant Kempton, the
 21 Caltrans Director, who testified that he had been advised of complaints by members of the Latino
 22 community (who oppose the message of Plaintiff) and then testified:

23 Q: WHAT WAS YOUR UNDERSTANDING OF THE COMPLAINT?
 24 KEMPTON: MY UNDERSTANDING OF THE COMPLAINT WAS THAT THERE WAS
 25 GREAT CONCERN ON THE PART OF THE COMPLAINANT THAT A GROUP
 26 THAT WAS – THAT WAS OPPOSED TO CERTAIN IMMIGRATION POLICIES
 27 WOULD HAVE BEEN ISSUED A PERMIT TO PICK UP LITTER ALONG A
 28 STATE HIGHWAY, PARTICULARLY A STATE HIGHWAY IN THE VICINITY
 OF A BORDER INSPECTION FACILITY WHERE THERE WOULD BE A GOOD
 DEAL OF IMMIGRATION TRAFFIC.

Kempton Depo., at [11:14-23]. [LRF Decl., Ex. 1, p. 3.]

Mr. Kempton further testified:

Q: WAS THIS A SUBJECTIVE CONCLUSION THAT YOU CAME TO ON YOUR
 OWN?
 KEMPTON: I WOULD SAY, YES, IT WAS A SUBJECTIVE CONCLUSION. AND I DID
 COME TO THAT CONCLUSION ON MY OWN.

Kempton Depo., at [13:25 to 14:4]. [LRF Decl., Ex. 1, pp. 4-5.]

10 *

Q: GOING BACK TO YOUR CONCERNS – YOUR SAFETY CONCERNS. WAS IT
 YOUR THOUGHT THAT THE NAME, SAN DIEGO MINUTE MEN, ITSELF WAS

1 GOING TO CAUSE PEOPLE TO HAVE AN ADVERSE REACTION OF SOME
2 SORT?

3 KEMPTON: IDON'T BELIEVE IT WAS GOING TO CAUSE PEOPLE, IN A GENERIC SENSE,
4 TO HAVE AN ADVERSE REACTION. I DID FEEL THAT IT COULD CAUSE
5 MEMBERS OF THE LATINO COMMUNITY AND SOME OF THE FOLKS –
6 SOME OF THE IMMIGRATION TRAFFIC, TO HAVE AN ADVERSE REACTION,
7 YES.

8 Q: SO IN OTHER WORDS, WHEN THEY SEE THE NAME, YOU BELIEVE THAT
9 THOSE MEMBERS OF THE COMMUNITY THAT YOU HAVE DESCRIBED
10 WOULD REACT NEGATIVELY TO THE MINUTEMEN'S POSITION ON
11 IMMIGRATION; IS THAT FAIR?

12 KEMPTON: I THINK THAT IS FAIR.

13 Q: AND THAT WAS THE UNDERLYING MOTIVATION FOR YOU TO MAKE THE
14 DECISION YOU MADE ABOUT THE SIGN?

15 KEMPTON: NO, I DON'T THINK THAT'S THE UNDERLYING MOTIVATION AS TO WHY
16 I MADE THE DECISION. THE UNDERLYING MOTIVATION IN MAKING THE
17 DECISION WAS AN ISSUE OF SAFETY. IT REALLY -- I MEAN, THE
18 RELATIONSHIP OF THE MINUTEMEN TO THE LATINO COMMUNITY IN
19 THIS INSTANCE WAS, OF COURSE, THE CONTROVERSY THAT I FORESAW.
20 BUT THE UNDERLYING MOTIVATION WAS A QUESTION OF SAFETY.

21 Q: SO THAT I CAN BE CLEAR ON THIS NOW - - AND THE QUESTION OF
22 SAFETY ARISES BECAUSE OF THE POSSIBLE ADVERSE REACTION BY
23 MEMBERS OF THE LATINO COMMUNITY AND OTHER GROUPS REACTING
24 TO THE MESSAGE OF THE MINUTEMEN AS TO THEIR POSITION ON
25 IMMIGRATION; IS THAT FAIR?

26 KEMPTON: THAT'S FAIR.

27 *Kempton Depo.*, at [14:24 to 17:1]. [*LRF Decl.*, Ex. 1, pp. 5-8.]

28

29 As is clear from the foregoing responses by Mr. Kempton, the decision by Defendants, and each
30 of them, to revoke the site-specific permit of the San Diego Minute Men, and to remove the courtesy
31 sign bearing their name in the dark of night, was based upon the viewpoint of the Plaintiff and, as
32 such, violates Plaintiff's first amendment rights under even the most lenient scrutiny.

33

34 It is equally clear that Defendants decision to revoke Plaintiff's site-specific permit and remove
35 their recognition sign granted a "heckler's veto" to those who opposed the message of the San Diego
36 Minute Men represented by their name on the recognition sign. This, too, is constitutionally
37 impermissible. In *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), the Defendant, the Missouri
38 Department of Revenue had revoked Plaintiff's vanity license plate "ARYAN-1." Eventually, the
39 DOR based its decision on the argument that it did so to promote "highway safety by rejecting
40 license plates that could incite so-called road rage. *Id.*, at p. 1080. In analyzing this argument the

1 Court reasoned:

2 The DOR contends that Ms. Lewis' plate may be regulated because it is likely to
 3 provoke a violent response. We think, however, that "[t]he only reason why [this]
 4 expressive conduct would be especially correlated with violence is that it conveys
 5 a particularly odious message; because the 'chain of causation' thus *necessarily*
 6 'run[s] through the persuasive effect of the expressive component' of the conduct
 7 (emphasis in original), the possibility for violence is a primary effect of the message
 8 itself. [Citations omitted.] While we do not disagree with the DOR that road rage
 9 is a conceivable consequence of the "ARYAN-1" plate, any road rage that might
 10 occur would result directly from the message of racial superiority that the plate
 11 would carry in the minds of some who read it.

12 Without evidence that Ms. Lewis has intentionally sought to provoke a violent
 13 reaction or has directed at a particular individual [fighting words], the mere
 14 possibility of a violent reaction to Ms. Lewis's speech is simply not a constitutional
 15 basis on which to restrict her right to speak. [Citations omitted.] "The argument
 16 amounts to little more than the self-defeating proposition that to avoid physical
 17 censorship of one who has not sought to provoke such a response by a hypothetical
 18 coterie of the violent and lawless, the States may more appropriately effectuate that
 19 censorship themselves," [*Cohen v. California*, 403 U.S. 15, 23 (1971)]. Even if we
 20 assume that the DOR made no judgment about the viewpoint of Ms. Lewis's
 21 speech, therefore, we reject its attempt to censor Ms. Lewis's speech because of the
 22 potential responses of its recipients. The first amendment knows no heckler's veto.
 23 *Lewis, supra*, 253 F.3d at 1081-1082.

24 Here, Plaintiff has alleged that, as a result of threats of violence and other pressure from those
 25 who oppose Plaintiff's point of view, Defendants granted a "heckler's veto." This allegation is
 26 bolstered by Caltrans Director Kempton's testimony, *supra*.

27 **b. A Highway is a Traditional Public Forum Requiring Strict Scrutiny of any**
 28 **Abridgment of Speech.**

29 Roads, highways and sidewalks have been classified as public fora so long they are often spoken
 30 of as "traditional public fora" and alleged speech abridgement at such fora are reviewed using the
 31 highest level of scrutiny. *See, e.g. Comit  De Jornaleros De Redondo Beach v. City of Redondo*
 32 *Beach*, 475 F.Supp.2d 952 (C.D. Cal. 2006). Indeed, the availability of these fora for public
 33 discourse are often stated as grounds for upholding time, place, manner restrictions on speech at
 34 other, less open fora. *See e.g. Hale v. Department of Energy*, 806 F.2d 910, 917 (9th Cir. 1986) [one
 35 factor bearing on the reasonableness of restriction is the existence of adjacent Highway as public
 36 forum for expressive activity]. Even if privately owned, the shoulder of a public highway is a public

1 forum. *Jackson v. City of Markham*, 773 F.Supp. 105, 107 (N.D. Ill. 1991) citing *Monterey County*
 2 *Democratic Central Committee v. United Postal Service*, 812 F.2d 1194, 1196 (9th Cir.1987).

3
 4 As mentioned above, several courts have concluded that Adopt-A-Highway programs along
 5 highways constitute “traditional public fora” requiring the strictest scrutiny of any effort to regulate
 6 speech. *Knights of Ku Klux Klan v. Arkansas State Highway and Transp. Dept.*, 807 F. Supp. 1427
 7 (W.D. Ark. 1992). In that case, the Court eloquently concluded:

8 The court believes that it is undeniable that in this day and time that public highway
 9 rights-of-way have become places where “speech” of one type or another is engaged
 in.

10 However, even if that is not true, and even if one can say that public highways and
 11 the public highway right-of-way are not traditional places of public speech, it is
 12 unquestionable, in this court's view, that the state has made them such, at least for
 13 purposes of allowing and encouraging individuals, groups, and organizations to
 14 participate in the Adopt-A-Highway Program in return for, among other things, the
 opportunity to advertise and promote their views or at least their good name. In this
 respect, the very policy statement which established the program and encouraged
 participation assures possible participants that signs will be erected containing the
 name of the adopting entity and that “news” media coverage will be encouraged ...
 to recognize participating organizations *supra* at 1430.

15 Does anyone seriously believe that at least some if not many of the more than
 16 2200 persons, groups, or organizations, who have adopted portions of Arkansas
 highways prior to December 9, 1991 did not do so, at least in part, because of the
 17 sign and the publicity that will come from their participation in the program?
 Surely not. In fact, it is evident from Chief Counsel Wilson's memorandum of
 18 December 9, 1992 to the District Engineer that at least he, as the Department's
 lawyer, believed that one of the benefits to participants was the good will and
 19 promotion received from the placing of the signs naming them. In that
 memorandum he said: “Because of the Klan's discriminatory practices, it would
 20 not be consistent with the aims of the State to spend State funds for signs that
 would promote the Klan.” (emphasis supplied).

21 Thus, the state has clearly opened for use by the public a place for “speech” through
 22 the program. Once having done so, the state may not discriminate against a person,
 group or organization simply because the state officials, and perhaps most of the
 23 citizens of the state, disagree with the views being espoused by a particular
 organization.

24 *Id.*, at 1435.

25
 26 It is this view that has found favor in the Courts within the Ninth Circuit. *See Comite De*
 27 *Jornaleros De Redondo Beach, supra; Hale, supra.*

28

1 In their motion, Defendants attempt to suggest otherwise. However, the cases cited are
 2 inapposite. First, Defendants' reference *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d
 3 505 (1976). Of course, that case concerned whether Fort Dix, a military base, could impose
 4 restrictions on discourse, and did not involve a public highway. *Id.*, 424 U.S. at 830-831. So too,
 5 the other case cited by Defendants, *Brown v. Cal. Dep't of Transp., et al.*, 321 F.3d 1217 (9th Cir.
 6 2003), also did not involve a highway, but instead a fence on an overpass. *Id.*, at 1222. Again, the
 7 authorities are clear that public thoroughfares are "the hallmarks of a traditional public forum."
 8 *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988).

9
 10 Thus, whether one concludes that the Northbound side of Interstate 5 thoroughfare is a public
 11 forum, whether by longstanding tradition or by designation, or a "non-public forum," the fact that
 12 Defendants revoked Plaintiff's site-specific permit because of Plaintiff's viewpoint places that
 13 decision in irreconcilable conflict with the First Amendment.

14
 15 **4. Defendants' Attempt to Move Plaintiff's Speech "Behind the Barn" is Impermissible.**

16
 17 The next substantive argument proffered by Defendants in their motion is that the removal of
 18 Plaintiff's speech from its original location to a remote section of another highway is permissible.
 19 Again, Defendants' argument is in error. This precise argument has been rejected in the Ninth
 20 Circuit. For example, in *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001), artists whose works
 21 were excluded from city hall, as allegedly being too controversial, brought a civil rights action to
 22 recover for alleged violation of their First Amendment rights. As a defense to the claim, the City
 23 argued that it could bar the work from city hall as long as it permitted the artwork to be displayed
 24 at other venues. The Court made short shrift of that argument:

25 The city steadfastly maintains that its exclusion of plaintiffs' works was not
 26 "censorship" since Hopper and Rupp "have been free to show their art throughout
 27 the City, *other than [at] city hall.*" The art, in Pasco's view, was merely ejected
 28 from the parlor, not thrown off the farm. But relegating the art to the barnyard does
not pass First Amendment scrutiny.

We do not endorse Pasco's cramped view of what constitutes censorship, and we

1 find none of the city's reasons for excluding the art work compelling. Although
 2 children may pass through the hallways of the building, the city concedes that the
 3 works are not obscene, and it is beyond peradventure that the works have serious
 4 artistic value. And the city offered no evidence to suggest that children would be
 5 harmed by, or even saw, the works. The mere fact that the works caused
 6 controversy is, of course, patently insufficient to justify their suppression. See *Texas*
 7 *v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there
 8 is a bedrock principle of the First Amendment, it is that the government may not
 9 prohibit the expression of an idea simply because society finds the idea itself
 10 offensive or disagreeable.") (citations omitted); *Consolidated Edison Co. v. Public*
 11 *Serv. Comm'n*, 447 U.S. 530, 537-38, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980);
 12 *Cinevision*, 745 F.2d at 571.
 13 *Id.*, at p.1081-1082. [Underlining supplied. Other emphasis in original.] [Footnote omitted.]

14 Thus, the revocation of Plaintiff's site-specific permit, and attempt to force Plaintiff to accept a
 15 new permit for a different site, is constitutionally impermissible and does not save the violation of
 16 Plaintiff's First Amendment rights.

17 **D. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO EQUAL PROTECTION** 18 **UNDER THE LAW.**

19 Under the Equal Protection Clause, government may not grant the use of a forum to people whose
 20 views it finds acceptable, but deny use to those wishing to express less favored or more controversial
 21 views. And it may not select which issues are worth discussing or debating in public facilities. Once
 22 a forum is opened up to assembly or speaking by some groups, government may not prohibit others
 23 from assembling or speaking on the basis of what they intend to say.

24 The Equal Protection Clause requires that statutes affecting First Amendment
 25 interests be narrowly tailored to their legitimate objectives. *Williams v. Rhodes*,
 26 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); see generally *Dunn v. Blumstein*,
 27 405 U.S., at 342-343, 92 S.Ct., at 1003. [Footnote 8 text: In a variety of contexts we
 28 have said that 'even though the governmental purpose be legitimate and substantial,
 that purpose cannot be pursued by means that broadly stifle fundamental personal
 liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S.
 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). This standard, of course, has
 been carefully applied when First Amendment interests are involved. *E.g.*,
Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 152, 84 L.Ed. 155 (1939); *De*
Jonge v. Oregon, 299 U.S. 353, 364-365, 57 S.Ct. 255, 259-260, 81 L.Ed. 278
 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 307, 60 S.Ct. 900, 904, 84 L.Ed.
 1213 (1940); *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d
 405 (1963); *Cox v. Louisiana*, 379 U.S. 559, 562-564, 85 S.Ct. 476, 479-481, 13
 L.Ed.2d 487 (1965); *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20

1 L.Ed.2d 672 (1968).]
 2 *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101-102 (including FN8)(1972).

3 In this case, it is clear that Plaintiff has set forth a facially valid claim of violation of its First
 4 Amendment right to free speech. *Complaint* [Doc#1], ¶¶1-15. Having done so, strict scrutiny of
 5 Defendant's conduct is required.

6 Again, the testimony of Director Kempton is illuminating:

7 Q: ARE YOU AWARE OF ANY OTHER SIGN BEING REMOVED OR RELOCATED
 8 BECAUSE OF THE NAME THAT WAS ON THE SIGN?

9 KEMPTON: I AM NOT.

10 *Kempton Depo.*, at [61:22-25]. [*LRF Decl.*, Ex. 1, p.13.]

11
 12 In fact, Director Kempton testified that the very location where the Plaintiff's site-specific permit
 13 had been revoked and their recognition sign had been removed was available for any other group:

14 Q: SO, THEN, AS WE SIT HERE TODAY, THAT PART OF HIGHWAY IS
 15 AVAILABLE FOR ANOTHER APPLICANT TO REQUEST A PERMIT,
 ENCROACHMENT PERMIT TO ADOPT THAT PART OF THE ROAD AS WE
 SIT HERE NOW, CORRECT?

16 KEMPTON: IF IT HASN'T BEEN REMOVED FROM THE ADOPT-A-HIGHWAY ELIGIBLE
 17 SEGMENTS OF HIGHWAY, THEN IT WOULD STILL BE AVAILABLE.

18 Q: WOULD YOU KNOW IF IT HAS BEEN REMOVED? IS THAT SOMETHING
 19 THAT WOULD BE PASSED BY YOU, CONSIDERING THIS LITIGATION AND
 ALL THE THINGS THAT ARE GOING ON?

20 KEMPTON: YES, I WOULD EXPECT TO KNOW. AND THE FACT THAT I DON'T KNOW
 IS AN INDICATION TO ME THAT IT HAS NOT BEEN REMOVED.

21 *Kempton Depo.*, at [43:22 to 44:11]. [*LRF Decl.*, Ex. 1, pp. 9-10.]

22 As noted above, Plaintiff is the only participant in the Adopt-A-Highway program who as ever had
 23 its site-specific permit revoked because of its viewpoint. Such disparate treatment, based purely on
 24 subjective whim, does not withstand such scrutiny. Plaintiff has set forth a valid, viable claim for
 25 declaratory and injunctive relief and relief pursuant to 42 U.S.C. §1983 based upon a violation of
 26 the equal protection clause of the Fourteenth Amendment. *Complaint* {Doc#1}, ¶¶1-20. Defendants'
 27 motion to dismiss must fail.

E. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS.

1. Defendants violated Plaintiff's Right to Procedural Due Process.

The requirements for establishing a violation of due process are well established. Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting).

The U.S. Supreme Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. *See, e.g., Connell v. Higginbotham*, 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Similarly, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) the Court determined that a non-tenured employee who was not re-hired at the end of his contract had not asserted a due process claim. However, in so doing, the Court noted that:

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. [Citation omitted.] *Id.*, at p. 575.

Thus, unlike Plaintiff in *Roth*, Plaintiff here has specifically alleged that Defendants' conduct impacted on Plaintiff's right to free speech. *Complaint* [Doc#1], ¶15.1. As noted above, the participation in the Adopt-A-Highway program is speech. *Knights of Ku Klux Klan v. Arkansas State Highway and Transp. Dept., supra*; *Cuffley II, supra*. As such, Plaintiff has demonstrated a fundamental right for which the procedural due process protections afforded by the Fourteenth Amendment apply.

Moreover, even absent the first amendment issue, Plaintiff still has asserted a right subject to due process requirements. As stated in *Roth*:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
Roth, supra, 408 U.S. at 577.

In this case, Plaintiff has alleged such a property interest. The complaint asserts that Plaintiff was granted and issued a site-specific encroachment permit for the I-5 NB location. *Complaint* [Doc#1], ¶¶7 & 10. Pursuant to the Adopt-A-Highway program guidelines, such a permit has a duration of five years. *Complaint* [Doc#1], Exhibit 2. Thus, Plaintiff had a "legitimate claim of entitlement" to the permit. Defendants reference to a portion of a sentence in the permit which states that the permit does not convey a "property" interest is misplaced. It is clear from the context in the full sentence in the permit ("This permit is not a property right and does not transfer with the property to a new owner") that it is referencing *not* a "property interest" in the due process analysis sense, but instead is simply noting that "real property interest" is not being conveyed to the permittee.

Moreover, a "property right" is not the only one protected by procedural due process. Plaintiff has expressed a "liberty interest" afforded due process protection.

'While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely **2707 freedom from bodily restraint but also the right

1 of the individual to contract, to engage in any of the common occupations of life,
 2 to acquire useful knowledge, to marry, establish a home and bring up children, to
 3 worship God according to the dictates of his own conscience, and generally to enjoy
 4 those privileges long recognized . . . as essential to the orderly pursuit of happiness
 5 by free men.’ Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed.
 6 1042. In a Constitution for a free people, there can be no doubt that the meaning of
 7 ‘liberty’ must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500,
 8 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31
 9 L.Ed.2d 551.
 10 *Roth, supra*, 408 U.S. at 572.

11 Axiomatically, the right of free speech is certainly one “essential to the orderly pursuit of
 12 happiness by free men,” as well as a “property right” entitled to due process protections.

13 As Director Kempton noted, the agreement between Caltrans and The San Diego Minute Men was
 14 *a contract*. *Kempton Demo.*, p. 48. When Caltrans unilaterally, and without following its own
 15 procedures for doing so, revoked Plaintiff’s site-specific permit, it violated that contract. Plaintiff’s
 16 complaint alleges that Caltrans has a specific process for revocation of a permitted’s site specific
 17 permit. Indeed, the “*Adopt-A-Highway Program Guidelines and Coordinators Handbook*” for
 18 which Defendants have sought judicial notice by this Court in conjunction with the instant motion,
 19 specifically sets forth such procedures. On page 3-16 of that guidebook, Caltrans has listed the
 20 reasons why a permit may be cancelled/revoked:

21 Permits may be cancelled for *[sic]* a several reasons, including:

- 22 • Permittee requests cancellation.
- 23 • Permit violations.
- 24 • Site fails to meet current site review criteria.
- 25 • Majority of site undergoing long-term construction.

26 Where a permittee falls within one of these four categories, the Guidebook then sets forth specific
 27 procedures which must be followed to first warn the permittee of such violations, then, if
 28 appropriate, take steps to revoke that permit. The complaint herein alleges that Defendants’
 29 revocation of Plaintiff’s site-specific permit did not meet any of the four criteria set forth in the
 30 Guidebook and that Defendants failed to follow its own established procedures and criteria for
 31 revocation of a site-specific permit, in violation of Plaintiff’s Constitutional due process rights.
 32 *Complaint* [Doc#1], ¶15.3. Taken as true, as they must, the allegations in the complaint set forth

1 sufficient facts which constitute a proper claim for relief. Therefore, the motion to dismiss must be
2 denied.

3
4 **2. Defendants violated Plaintiff's Substantive Due Process Rights.**

5
6 As noted in the moving papers, the analysis for determining whether substantive due process
7 rights have been violated are (1) Is there a fundamental right; (2) Is the constitutional right infringed;
8 (3) Is there a sufficient justification for the government's infringement of a right; and (4) Is the
9 means sufficiently related to the purpose? Plaintiff has alleged such a fundamental right (*Complaint*
10 [Doc#1], ¶¶15.1-2) and that Defendants' violation of this right was arbitrary and capricious
11 *Complaint* [Doc#1], ¶15.3), *i.e.* unjustified and unrelated to its purpose.

12
13 **a. Plaintiff has a Fundamental Right to Free Speech.**

14 Misstating Plaintiff's claim as stemming from the attempted movement of Plaintiff's site-
15 specific permit, Defendants then conclude that "access to a particular location to clean the State's
16 highways via the A.H Program is "deeply rooted in this Nation's history and tradition." Of course,
17 the faulty premise dooms Defendant's conclusion. Plaintiff's claim is that Defendant's abridgement
18 of Plaintiff's right to speech violated Plaintiff's Rights. It is beyond dispute that the right of free
19 speech protected by the First Amendment *is* a fundamental right. (*Police Dept. of Chicago v.*
20 *Mosley, supra*, 408 U.S. at p.101 and fn.8). As such, the Defendants' actions are subject to the
21 strictest scrutiny. "Regulations that impinge on fundamental Rights are subject to strict scrutiny."
22 *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).
23 Thus, in order to survive, such a regulation must be narrowly tailored to serve a compelling state
24 interest. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

25
26 **b. Plaintiff's Right to Free Speech Has Been Infringed.**

27 As discussed in Section II.B, *supra*, Plaintiff has alleged an infringement of its right to free
28 speech. Again, Defendants' effort to "restate" Plaintiff's claim as one relating to the movement of

1 Plaintiff's permitted location is incorrect. Clearly, an infringement of Plaintiff's First Amendment
2 right to free speech satisfies this element of the substantive due process analysis.

3
4 **c. Defendants' Actions Cannot Survive Scrutiny.**

5 As noted above, Plaintiff's allege (and the facts adduced in deposition bear out) that Defendants'
6 purpose in revoking Plaintiff's site-specific permit was to silence Plaintiff's message as embodied
7 in Plaintiff's name. *Complaint* [Doc#1], ¶¶15.1. It did so by granting a "heckler's veto" to those
8 who opposed Plaintiff's viewpoint. The claim of "safety" arises only from Defendant's assertion
9 that persons opposed to Plaintiff's viewpoint would engage in "road rage" in response to seeing a
10 sign bearing Plaintiff's name on the side of the highway. Such a justification was precisely rejected
11 as deficient in *Lewis v. Wilson, supra* (253 F.3d at 1081-1082).

12
13 Having failed this step, analyzing the conduct's relationship to the State's purpose is unnecessary.
14 However, the Complaint alleges that Defendants' conduct was arbitrary and capricious (*i.e.* without
15 a valid relationship to any proper governmental purpose). *See Complaint* [Doc#1] at paragraph 2.

16
17 **F. PLAINTIFF HAS PROPERLY PLEADED A CLAIM PURSUANT TO 42 U.S.C.**
18 **§1983.**

19
20 To state a claim under 42 U.S.C. § 1983 , a plaintiff must allege two essential elements: (1) that
21 a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged
22 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S.
23 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

24
25 Here, the Plaintiff's third cause of action pursuant to §1983 (which incorporates the all of the
26 factual allegations of the complaint) alleges that Defendants conduct under color of State law
27 deprived Plaintiff of its constitutional rights. Thus, the claim has been properly stated and the
28 motion to dismiss must be denied.

1 **G. DEFENDANT CALTRANS IS NOT IMMUNE FROM SUIT UNDER THE**
 2 **ELEVENTH AMENDMENT TO THE CONSTITUTION.**

3
 4 Having demonstrated that Plaintiff's complaint sets forth facts which, taken as true, would entitle
 5 Plaintiff to obtain the relief requested against each the named defendants. The next issue presented
 6 is whether Caltrans is entitled to escape its liability by reliance on the Eleventh Amendment to the
 7 United States Constitution. Plaintiffs contend Caltrans may not.

8
 9 **1. The Eleventh Amendment Does Not Preclude Suits Against a State by Citizens of that**
 10 **State based on Federal Questions.**

11 The Eleventh Amendment is brief, and provides:

12 The Judicial power of the United States shall not be construed to extend to any suit
 13 in law or equity, commenced or prosecuted against one of the United States by
 14 Citizens of another State, or by Citizens or Subjects of any Foreign State.

15 *United States Constitution*, Amendment XI.

16
 17 Upon plain reading, one is struck by the fact that it makes no reference to claims asserted against
 18 a State by Citizens of *that State*. In analyzing this very issue, the United States Supreme Court has
 19 been sharply divided. *See, e.g. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028,
 20 138 L.Ed.2d 438 (1997). Although the Supreme Court has found such immunity exists (*see, e.g.*
 21 *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890)), Plaintiff asserts that the thorough
 22 historical analysis of the Eleventh Amendment and legal reasoning of Justice Souter's dissent (joined
 23 by Justices Ginsburg and Breyer) in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 100, 116 S.Ct.
 24 1114, 134 L.Ed.2d 252 (1996) is the correct interpretation of the genesis and application of the
 25 Eleventh Amendment. As noted by Justice Souter:

26 The *Hans* Court erroneously assumed that a State could plead sovereign immunity
 27 against a noncitizen suing under federal-question jurisdiction, and for that reason
 28 held that a State must enjoy the same protection in a suit by one of its citizens. The
 error of *Hans* 's reasoning is underscored by its clear inconsistency with the
 Founders' hostility to the implicit reception of common-law doctrine as federal law,

1 and with the Founders' conception of sovereign power as divided between the States
2 and the National Government for the sake of very practical objectives.

* * *

3 The history and structure of the Eleventh Amendment convincingly show that it
4 reaches only to suits subject to federal jurisdiction exclusively under the
5 Citizen-State Diversity Clauses. In precisely tracking the language in Article III
6 providing for citizen-state diversity jurisdiction, the text of the Amendment does,
7 after all, suggest to common sense that only the Diversity Clauses are being
8 addressed. If the Framers had meant the Amendment to bar federal-question suits
9 as well, they could not only have made their intentions clearer very easily, but could
10 simply have adopted the first post-*Chisholm* proposal, introduced in the House of
11 Representatives by Theodore Sedgwick of Massachusetts on instructions from the
12 Legislature of that Commonwealth. Its provisions would have had exactly that
13 expansive effect:

14 “[N]o state shall be liable to be made a party defendant, in any of the judicial
15 courts, established, or which shall be established under the authority of the United
16 States, at the suit of any person or persons, whether a citizen or citizens, or a
17 foreigner or foreigners, or of any body politic or corporate, whether within or
18 without the United States.” *Gazette of the United States* 303 (Feb. 20, 1793).

19 *Id.*, at pp.102 and 110-111 (footnotes omitted).

20 Justice Souter’s reasoning is sound, historically accurate and the action against Caltrans should
21 proceed.

22 **2. State Officials in their Official Capacities are “Persons” and Are Not Immune from** 23 **Suite for Declaratory and Injunctive Relief.**

24 Defendants assert that Defendants Bonner, Kempton and Orso-Delgado, acting in their official
25 capacities, are immune from suit pursuant to the Eleventh Amendment. However, when sued for
26 prospective injunctive relief, a state official in his official capacity is considered a “person” for §
27 1983 purposes and a suit for prospective injunctive relief provides a narrow, but well-established,
28 exception to Eleventh Amendment immunity. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

As noted in *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003):

29 Although Plaintiffs' allegations are rooted in events that occurred in the past, the
30 injunctive and declaratory relief that they seek would prevent future and ongoing
31 illegality. The Eleventh Amendment poses no bar to Plaintiffs' claims for
32 prospective relief.

33 *Id.*, at 491.

34 Clearly, the Complaint herein seeks prospective injunctive relief as to an alleged ongoing
35 violation of Plaintiff’s civil rights. Therefore, the claims asserted against the individual defendants

1 in their official capacity are properly stated.

2
3 **3. No Qualified Immunity for Individual Defendants Where There Are Constitutional**
4 **Violations of Clearly Established Rights.**

5 Even if the Eleventh Amendment rendered the State immune from suits on federal questions, the
6 individual defendants (Bonner, Kempton and Orso-Delgado) are clearly not personally immune from
7 the claims herein. In *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme
8 Court confirmed that where a representative of the state purports to engage in conduct which violates
9 the federal constitution, the representative is “stripped of his official or representative character and
10 is subjected in his person to the consequences of his individual conduct.” *Ex Parte Young, supra*,
11 209 U.S. at p. 160. Simply put, claims against government officials in their personal capacities are
12 not barred by the Eleventh Amendment. *Pena v. Gardner*, 976 F.2d 469, 472-473 (1992) (*citing*
13 *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *DeNieva v. Reyes*, 966 F.2d
14 480, 483-84 (9th Cir.1992)).

15 As noted in *Hafer, supra*:

16 Personal-capacity suits, on the other hand, seek to impose individual liability upon
17 a government officer for actions taken under color of state law. Thus, “[o]n the
18 merits, to establish personal liability in a § 1983 action, it is enough to show that
19 the official, acting under color of state law, caused the deprivation of a federal
20 right.” [citing *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87
21 L.Ed.2d 114 (1985)].
22 *Hafer, supra*, 502 U.S. at p.25.

23 Thus, government officials sued in their personal capacities are subject to suit for damages under
24 42 U.S.C. §1983 for actions taken in her official capacity. *Hafer, supra*, 502 U.S. at p.27. Such
25 officials possess a qualified immunity *only* if their conduct does not violate “clearly established
26 statutory or constitutional Rights of which a reasonable person would have known. Here, Plaintiff’s
27 right to free speech under the First Amendment, and to equal protection and due process under the
28 Fourteenth Amendment, can hardly be characterized as Rights not “clearly established.” Indeed in
cases such as *Cuffley II*, and *Knights of Ku Klux Klan and Lewis*, cited herein and which span from
1992 to 2002, as well as the Ninth Circuit’s decision in *Hopper, supra*, clearly established that

1 Defendants could not revoke Plaintiff's site-specific permit without violating Plaintiff's Rights,
2 particularly where it constituted a grant of a "heckler's veto." Nor are these Rights ones which
3 anyone can plausibly argue that a "reasonable person would not have known." The motion must
4 be denied.

6 III. CONCLUSION

8 Confining one's analysis to Plaintiff's Complaint, it becomes clear that as to the substantive
9 allegations, Plaintiff has set forth claims upon which relief may be granted as to each of the
10 Defendants. Thus, unless there is some other bar to such claims, Plaintiff is entitled to pursue them
11 in this action. If, as a result of the instant motion's recitation of facts beyond the complaint, the
12 Court chooses to consider the motion as one pursuant to Federal Rule of Civil Procedure 56, the
13 undisputed facts confirm the allegations of the complaint and demonstrate the validity of Plaintiff's
14 claims herein.

16 Plaintiff acknowledges authorities which hold that the Eleventh Amendment, despite its clear
17 language, encompasses the notion of sovereign immunity of the State from claims by citizens of that
18 state. However, Plaintiff contends that the better historical and legal analysis is that the Eleventh
19 Amendment does not bar federal constitutional claims against a State by Citizens of that State.

21 As to the individual Defendants, no immunity applies to protect them from suit for prospective
22 relief in their official capacities nor, in their personal capacities, for damages for their violations of
23 Plaintiff's Constitutional Rights. Therefore, the motion to dismiss must be denied as to the
24 individual defendants.

25 DATED: April 25, 2008

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